INDEX.

Page

Preliminary Statement 1

Argument 3

I. The constitutionality of the 1967 Missouri Congressional Redistricting Act is fully supported by "rational grounds." 3

A. Raw population differences between the largest district (8th) and the smallest district (4th) are justified by other considerations and do not result in voter inequality between the two districts 3

B. Comparison of 1968 Total Congressional Vote to District Population (1960 Federal Census) .. 7

II. Appellees have erroneously rejected the legitimacy of the legislative function in establishing congressional districts. (Pages 16-23, Appellee's Brief) ... 12

III. Appellees erroneously conclude that more substantial voter equality would result by the transfer of counties between adjacent districts (pages 13 through 16, Appellees' brief) 14

IV. Appellees have erroneously applied burden of proof standards to this case. (Pages 7-11, Appellee's Brief) 16

Legislative Apportionment Cases Appealed To United States Supreme Court 19

Conclusion 21

Table of Cases and Citations

Cases Cited:

Page

Avery v. Midland County, Texas, 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114 (1968) 3

Burns v. Richardson, 384 U.S. 73, 16 L.Ed.2d 376, 86 S.Ct. 1286 (1966) 15

Commissioner v. Dubelstein, 363 U.S. 278, 4 L.Ed.2d 1218, 80 S.Ct. 1190 (1960) 18

Exon v. Tiemann, 279 F.Supp. 609 (1968) 16

George Washington Law Review, May 1968, Volume 36, No. 4 5

New York Times, Sunday, November 10, 1968, Section L, Page 76 6

Preisler v. Secretary of State of Missouri, 279 F.Supp. 952 (1967) 17

United States v. United States Gypsum Co., 333 U.S. 364, 92 L.Ed. 746, 68 S.Ct. 525 (1948) 15

U.S. Census of Population: 1960, Vol. I, Characteristics of the Population. Part A. Number of Inhabitants. U.S. Government Printing Office, Washington, D.C., 1961 16

NOS. 1116 & 1117

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES C. KIRKPATRICK, Secretary of State of Missouri, and NORMAN H. ANDERSON, Attorney General of Missouri,

Appellants,

and

F. V. HEINKEL, R. J. ROSIER, W. W. BECKETT, A. D. SAPPINGTON, L. O. WALLIS, MILLER HERN, HERMAN HETLAGE, HERMAN KERTZ, TURPIN YOUTSEY and GLEN MYERS,

Intervenor-Appellants,

vs.

PAUL W. PREISLER, LOUISE ERBE, BOSTIC J. FRANKLIN, LUCILE RIEDEL, DOROTHY CHILDS, SARAH RIFKIN, and MARTHA LEONARD,

Appellees.

On Appeal from the United States District Court For the Western District of Missouri Central Division.

APPELLANTS' REPLY BRIEF.

PRELIMINARY STATEMENT.

Appellees' Brief on the Merits does not attempt to reply in detail to the factual matters set forth in Appellants' brief nor to the propositions of law advanced in detail in Appellants' brief. Appellees chose to treat most of Appellant's brief in regard to facts and in regard to law with superficial

conclusions which negative the arguments advanced by Appellants rather than with reasoned arguments to overcome the arguments advanced by Appellants.

However, in Appellants' judgment some reply to Appellees' arguments may be helpful to the court.

ARGUMENT.

I.

The constitutionality of the 1967 Missouri Congressional Redistricting Act is fully supported by "rational grounds."

Appellees have advanced the argument on pages 7 through 9 of their brief that the burden of proof is on Appellants to support the validity of the Congressional Redistricting Act under review on "rational grounds." This theme is repeated continuously throughout Appellees' brief under most of the other arguments advanced by them. Although many rational considerations of the Missouri Legislature which played some role in the legislative process in the enactment of the law under review are discussed in detail in Appellants' brief, Appellees have not responded in their brief to most of these discussions.

Appellees cite the raw census statistics of 1960 which show a population difference between the largest district (the 8th) and the smallest district (the 4th) of more than 25,000 people and leap to the conclusion that this difference in population proves that a citizen in the 8th district does not have a vote in congressional elections equal to the vote of a citizen in the 4th district. This simplistic approach, based upon seven year old raw population statistics, is totally arbitrary and reflects a complete blindness to reality. Justice Fortas has reflected in his dissenting opinion in **Avery v. Midland County, Texas**, 390 U.S. 474, 88 S.Ct. 1114, l.c. 1132, 20 L.Ed.2d 45, l.c. 66 (1968) "Substance not shibboleth should govern in this admittedly complex and subtle area; * * *." Let us again examine the substance.

A.

Raw population differences between the largest district (8th) and the smallest district (4th) are justified by other considerations and do not result in voter inequality between the two districts.

Appellants' brief has discussed in detail the evidence in the record which shows conclusively that the excessive raw population in the largest district does not result in a debasement of the right to vote in that district. Large numbers of transitory nonresident, nonvoting population are included in the raw census statistics for that district. The effect of such transitory population at Ft. Leonard Wood, a huge military reservation in Pulaski County, is reflected by the table on page 36 of Appellant's brief which shows the relationship of total vote to population in the presidential election of 1964 in Pulaski County and in every county surrounding Pulaski County. The percentage ratio of total votes to population in Pulaski County was 11.2%. The ratio of total votes to population in Phelps County, which includes a branch of the University of Missouri and some of the overflow transitory population from Fort Leonard Wood, was 37.5%. However, the ratio of total votes to population in the remaining counties ranged from 44% to 56.2%.

A single presidential election is arguably not an accurate index of the voting strength of Pulaski County. However, the fact is fully borne out by the following table showing the percentage of total vote to population for these same counties in all general congressional elections from 1960 through 1966.

TOTAL VOTE CAST IN CONGRESSIONAL GENERAL ELECTIONS. SELECTED MISSOURI COUNTIES

1960-1966

Year	County	Population	Vote	Percentage
1966	Pulaski	46,567	2769	5.96
	Phelps	25,396	5990	23.58
	Laclede	18,991	5486	28.88
	Texas	17,758	3675	20.68
	Miller	13,800	4328	31.36
	Camden	9,116	4059	44.41
	Maries	7,282	2104	28.89

Year	County	Population	Vote	Percentage
1964	Pulaski	46,567	5120	10.99
	Phelps	25,396	9260	36.46
	Laclede	18,991	8021	42.23
	Texas	17,758	7690	43.30
	Miller	13,800	6531	47.32
	Camden	9,116	4886	53.59
	Maries	7,282	3144	43.17
1962	Pulaski	46,567	3609	7.75
	Phelps	25,396	5821	22.92
	Laclede	18,991	6369	33.53
	Texas	17,758	5846	32.92
	Miller	13,800	4814	34.88
	Camden	9,116	4059	44.41
	Maries	7,282	2388	32.79
1960	Pulaski	10,392	6131	58.99
	Phelps	21,504	9964	46.33
	Laclede	19,010	8728	45.91
	Texas	18,992	8938	47.06
	Miller	13,734	6972	50.76
	Camden	7,861	5157	65.60
	Maries	7,423	3303	44.49

Source—P. 1144, Official Manual, State of Missouri, 1967-1968
P. 1275, Official Manual, State of Missouri 1965-1966
P. 1233, Official Manual, State of Missouri, 1963-1964
P. 1145, Official Manual, State of Missouri, 1961-1962
Pp. 27-13, 14, U.S. Census Population; 1960, No. of Inhabs., Mo.
Final Report PC (1-27A)

It is noted that in 1960 58.99% of the Pulaski County population voted in the congressional election. The percentage plunged to 7.75% in 1962, 10.99% in 1964 and 5.96% in 1966. This radical reduction in percentage of total vote to population is accounted for because the military population at Ft. Leonard Wood was not counted in Pulaski County for the 1950 census, which are the population figures reflected on the 1960 Election portion of the above table.

Retired Justice Tom C. Clark in his introduction to a symposium entitled One-Man-One-Vote and Local Government, **George Washington Law Review**, May 1968, Volume 36, No. 4, commented upon the fallibility of raw census statistics in measuring the debasement of voting rights in a district such as the 8th district of Missouri as follows:

> "The one man, one vote rule will never become reality. As Professor Banzhaf points out, our census is not based

on eligible voters but on living persons. It includes people who never register to vote—children, aliens, transient students at a large university, military personnel who by happenstance are in an area at census time, insane people, felons both in and out of prison and others who for various local rules are not entitled to vote. Still by inclusion in the census they might well give a district a higher percentage of representation. * * *"

The invalidity of raw census statistics as a sole standard for measuring voter equality is further demonstrated by the voting experience in the 1968 congressional elections. Appellants have tabulated below the Missouri congressional districts by population from the largest district to the smallest and have reflected the total vote cast for congressional candidates in each district. The voting statistics are from unofficial returns reported in the New York Times, Sunday, November 10, 1968, Section L. Page 76.

COMPARISON OF 1968 TOTAL CONGRESSIONAL VOTE TO DISTRICT POPULATION (1960 FEDERAL CENSUS)

Rank	Pop.	Dist.	Vote	Rank
		MISSOURI		
(1)	445,523	8th	156,490	(4)
(2)	439,746	1st	120,183	(10)
(3)	436,769	7th	173,038	(3)
(4)	436,448	2nd	206,307	(1)
(5)	436,099	3rd	139,548	(7)
(6)	431,178	5th	126,885	(8)
(7)	428,223	9th	192,594	(2)
(8)	423,768	10th	124,692	(9)
(9)	422,238	6th	144,689	(5)
(10)	419,721	4th	141,621	(6)

The 8th congressional district, although first in 1960 raw population, was fourth in total vote in a hotly contested congressional race. The 4th congressional district, although tenth in 1960 raw population was sixth in total vote in a contest in which the Democratic incumbent had token opposition. The 6th district, although ninth in 1960 raw popula-

tion, was fifth in total vote in a lively contest. The 1st district, although second in 1960 raw population, was tenth in total vote in a hotly contested race to elect Missouri's first Negro congressman. The low ratio of vote to 1960 raw population in the 1st district also reflects the declining population experienced nationally in such innercity districts. The 2nd district, although fourth in 1960 raw population, was first in total vote in a hotly contested race in which a Democrat captured a traditionally safe Republican seat. The 9th district, although seventh in 1960 raw population, was second in total vote in a hotly contested race. Appellees have urged that the 9th district should be increased in raw population (P. 16, Appellee's brief). It is Appellants' judgment that the recent election experience strongly suggests tremendous population growth in the 9th district since 1960, thus, if anything, warranting a smaller raw population.

The fallibility of raw population figures as an absolute standard to measure voting inequities in congressional districts is demonstrated on a national basis by the experience of the several states in the recent election. Appellants have tabulated the voting experience in the 1968 general congressional elections with relation to 1960 raw population statistics for these districts. States selected in the following table are from all sections of the country.

B.

COMPARISON OF 1968 TOTAL CONGRESSIONAL VOTE TO DISTRICT POPULATION (1960 FEDERAL CENSUS)

Rank	Pop.	Dist.	Vote	Rank
		ALABAMA		
(1)	438,130	6th	84,867	(6)
(2)	435,745	5th	79,561	(8)
(3)	414,392	1st	92,166	(2)
(4)	417,052	7th	88,574	(3)
(5)	407,939	4th	84,334	(7)
(6)	396,075	2nd	109,251	(1)
(7)	383,782	3rd	86,080	(4)
(8)	383,625	8th	85,812	(5)

Rank	Pop.	Dist.	Vote	Rank
		FLORIDA		
(1)	448,885	11th	125,512	(9)
(2)	418,595	3rd	124,807	(10)
(3)	416,579	6th	128,546	(8)
(4)	415,496	1st	131,511	(7)
(5)	413,597	7th	186,470	(1)
(6)	411,550	8th	unop.	
(7)	407,677	2nd	unop.	
(8)	406,367	4th	169,628	(5)
(9)	405,969	5th	176,969	(3)
(10)	405,633	10th	175,282	(4)
(11)	401,251	9th	185,128	(2)
(12)	400,061	12th	135,320	(6)
		INDIANA		
(1)	428,197	6th	161,895	(9)
(2)	428,100	11th	145,173	(11)
(3)	427,267	1st	157,747	(10)
(4)	426,620	7th	181,650	(7)
(5)	425,360	9th	189,562	(5)
(6)	424,760	8th	205,533	(2)
(7)	423,824	4th	192,460	(3)
(8)	423,227	2nd	189,834	(4)
(9)	419,765	5th	274,910	(1)
(10)	418,226	3rd	177,445	(8)
(11)	417,156	10th	183,074	(6)
		KANSAS		
(1)	459,063	4th	151,670	(4)
(2)	450,661	2nd	160,282	(2)
(3)	439,686	5th	157,868	(3)
(4)	435,145	1st	162,718	(1)
(5)	394,056	3rd	118,204	(5)
		CALIFORNIA		
(1)	446,974	2nd	206,866	(9)
(2)	434,447	38th	189,221	(15)
(3)	434,364	36th	206,350	(11)
(4)	433,812	35th	286,462	(1)
(5)	433,295	5th	115,770	(36)
(6)	432,438	16th	152,665	(27)
(7)	432,114	25th	206,332	(12)
(8)	431,237	15th	159,446	(24)
(9)	429,933	27th	219,117	(5)
(10)	428,808	11th	206,461	(10)
(11)	428,545	6th	192,504	(14)
(12)	426,242	22nd	176,765	(21)
(13)	423,706	18th	151,282	(28)
(14)	421,032	28th	231,622	(3)
(15)	416,461	26th	195,840	(13)
(16)	415,898	33rd	183,045	(19)
(17)	414,736	3rd	186,411	(17)
(18)	413,568	12th	148,306	(31)
(19)	412,283	1st	170,083	(22)
(20)	411,201	20th	189,156	(16)
(21)	409,469	24th	206,903	(7)
(22)	409,030	14th	209,096	(6)
(23)	406,743	31st	157,098	(25)
(24)	406,332	37th	147,803	(32)
(25)	404,474	19th	149,141	(30)
(26)	403,953	29th	143,020	(35)

Rank	Pop.	Dist.	Vote	Rank
(27)	402,717	34th	208,206	(6)
(28)	401,148	21st	95,200	(38)
(29)	399,473	30th	111,693	(37)
(30)	398,711	4th	154,009	(26)
(31)	397,745	9th	178,412	(20)
(32)	395,452	7th	150,241	(29)
(33)	395,241	10th	233,734	(2)
(34)	394,860	32nd	183,802	(18)
(35)	393,621	17th	146,244	(34)
(36)	393,199	13th	225,285	(4)
(37)	392,973	8th	162,815	(23)
(38)	392,756	23rd	147,234	(33)
		COLORADO		
(1)	493,887	1st	199,363	(2)
(2)	438,974	2nd	244,697	(1)
(3)	415,187	3rd	169,764	(3)
(4)	405,899	4th	169,184	(4)
		ILLINOIS		
(1)	451,527	8th	156,910	(17)
(2)	451,042	9th	132,705	(22)
(3)	450,884	11th	215,765	(4)
(4)	441,332	22nd	169,119	(14)
(5)	439,182	14th	229,613	(2)
(6)	433,935	10th	216,673	(3)
(7)	429,267	3rd	174,942	(12)
(8)	428,519	17th	183,598	(10)
(9)	425,454	2nd	154,271	(18)
(10)	420,109	6th	103,630	(23)
(11)	417,760	21st	203,272	(5)
(12)	416,712	7th	96,008	(24)
(13)	415,838	4th	194,477	(7)
(14)	415,110	24th	158,625	(16)
(15)	412,709	23rd	188,747	(8)
(16)	410,650	15th	194,845	(6)
(17)	410,402	19th	180,805	(11)
(18)	409,195	1st	137,417	(21)
(19)	407,052	13th	250,156	(1)
(20)	401,919	20th	187,201	(9)
(21)	401,862	5th	150,533	(19)
(22)	401,503	18th	174,608	(13)
(23)	394,914	12th	158,885	(15)
(24)	394,481	16th	137,749	(20)
		NORTH CAROLINA		
(1)	423,750	7th	unop.	
(2)	421,735	6th	141,711	(6)
(3)	420,074	11th	146,233	(4)
(4)	415,365	2nd	unop.	
(5)	413,729	10th	158,608	(2)
(6)	413,668	3rd	106,609	(8)
(7)	412,765	1st	113,888	(7)
(8)	412,329	4th	151,735	(3)
(9)	408,720	9th	unop.	
(10)	407,546	8th	143,866	(5)
(11)	406,474	5th	164,341	(1)
		OKLAHOMA		
(1)	396,161	3rd	123,716	(5)
(2)	392,905	4th	124,418	(4)

Rank	Pop.	Dist.	Vote	Rank
(3)	389,106	5th	122,534	(6)
(4)	386,133	1st	155,933	(1)
(5)	382,145	2nd	139,419	(3)
(6)	380,734	6th	143,647	(2)
		NEW JERSEY		
(1)	432,174	4th	187,208	(9)
(2)	424,175	10th	136,777	(12)
(3)	418,260	1st	203,061	(2)
(4)	416,115	4th	206,739	(1)
(5)	415,158	11th	136,033	(13)
(6)	412,139	12th	192,605	(5)
(7)	411,084	15th	190,966	(8)
(8)	406,818	8th	163,065	(10)
(9)	405,533	5th	201,935	(3)
(10)	396,396	14th	134,732	(14)
(11)	390,134	9th	194,012	(4)
(12)	390,121	7th	191,646	(7)
(13)	389,066	13th	122,833	(15)
(14)	382,413	3rd	191,760	(6)
(15)	374,996	2nd	156,760	(11)
		TENNESSEE		
(1)	404,968	2nd	102,403	(7)
(2)	401,152	3rd	125,250	(1)
(3)	400,916	7th	113,037	(4)
(4)	399,743	5th	103,595	(6)
(5)	395,918	1st	116,539	(3)
(6)	395,594	4th	100,376	(8)
(7)	390,336	8th	unop.	
(8)	389,722	9th	116,561	(2)
(9)	388,240	6th	104,548	(5)
		MARYLAND		
(1)	393,210	2nd	142,866	(3)
(2)	389,967	5th	165,121	(2)
(3)	388,294	8th	171,087	(1)
(4)	387,526	1st	113,553	(5)
(5)	386,991	6th	132,068	(4)
(6)	386,267	7th	101,159	(6)
(7)	385,197	3rd	76,497	(8)
(8)	383,237	4th	90,055	(7)
		NEW YORK		
(1)	435,684	40th	160,373	(16)
(2)	435,390	41st	123,104	(29)
(3)	435,393	39th	242,508	(1)
(4)	434,770	9th	140,638	(24)
(5)	434,750	7th	134,985	(26)
(6)	434,615	6th	164,148	(15)
(7)	434,552	8th	173,029	(12)
(8)	425,905	31st	144,949	(21)
(9)	425,822	29th	204,243	(3)
(10)	423,028	34th	182,018	(9)
(11)	420,467	26th	186,336	(8)
(12)	420,146	25th	189,404	(6)
(13)	417,478	16th	138,831	(25)
(14)	417,298	12th	52,933	(39)
(15)	417,122	10th	150,727	(19)
(16)	417,093	15th	120,111	(30)
(17)	417,090	11th	55,788	(38)

Rank	Pop.	Dist.	Vote	Rank
(18)	417,080	14th	65,985	(41)
(19)	417,040	13th	157,804	(17)
(20)	415,333	33rd	82,670	(33)
(21)	415,030	30th	180,864	(10)
(22)	410,943	36th	196,949	(4)
(23)	410,432	37th	177,858	(11)
(24)	409,349	27th	80,040	(35)
(25)	396,122	28th	80,536	(34)
(26)	393,585	1st	215,498	(2)
(27)	393,465	2nd	130,367	(27)
(28)	393,434	3rd	188,512	(7)
(29)	393,183	4th	165,809	(13)
(30)	393,288	5th	195,313	(5)
(31)	390,861	18th	45,879	(40)
(32)	390,742	17th	164,463	(14)
(33)	390,552	21st	65,928	(36)
(34)	390,492	22nd	59,603	(37)
(35)	390,363	20th	83,698	(32)
(36)	390,228	23rd	130,226	(28)
(37)	390,057	24th	149,993	(20)
(38)	390,023	19th	113,340	(31)
(39)	386,148	35th	155,089	(18)
(40)	385,406	32nd	144,334	(22)
(41)	382,277	38th	140,782	(23)
		TEXAS		
(1)	450,353	6th	unop.	
(2)	449,590	14th	unop.	
(3)	446,844	20th	77,215	(11)
(4)	445,815	21st	147,223	(2)
(5)	443,776	23rd	unop.	
(6)	438,578	12th	unop.	
(7)	422,063	17th	unop.	
(8)	418,183	15th	unop.	
(9)	417,396	22nd	157,163	(1)
(10)	417,283	7th	unop.	
(11)	416,083	10th	124,306	(6)
(12)	415,882	18th	119,453	(7)
(13)	414,160	3rd	136,937	(4)
(14)	412,192	5th	129,138	(5)
(15)	410,498	4th	unop.	
(16)	408,479	8th	88,689	(9)
(17)	398,127	1st	unop.	
(18)	396,402	9th	117,091	(8)
(19)	394,679	16th	84,258	(10)
(20)	394,457	13th	142,665	(3)
(21)	391,589	19th	unop.	
(22)	389,954	11th	75,339	(12)
(23)	387,794	2nd	unop.	
		WISCONSIN		
(1)	408,667	1st	172,159	(3)
(2)	400,567	8th	160,567	(4)
(3)	399,528	5th	111,511	(10)
(4)	397,918	2nd	179,800	(2)
(5)	397,429	9th	200,051	(1)
(6)	397,333	4th	158,960	(5)
(7)	391,743	6th	150,716	(8)
(8)	389,675	10th	158,054	(6)
(9)	387,077	7th	156,669	(7)
(10)	382,818	3rd	150,664	(9)

II.

Appellees have erroneously rejected the legitimacy of the legislative function in establishing congressional districts. (Pages 16-23, Appellee's Brief).

Appellees argue in their brief that a court may not take into consideration whether or not a particular congressional redistricting law is the result of a reasonable legislative compromise in determining the constitutional validity of population variations. It is difficult to perceive the precise point which Appellees attempt to advance in this argument. Appellees seem to argue that establishing congressional districts is not a legislative function. In this regard Appellees allude to the judicial term "political question" and seem to conclude that establishing congressional districts is really a ministerial function for the legislature which must be supported by all of the evidentiary requirements essential to a valid judicial decree. Thus, after relegating to judicial contempt such terms as "political question," "political thicket," "partisan political considerations," "individual legislator interests in favorable districts," "political matter," and "political considerations," Appellees conclude "* * * that in performing the function of congressional district line-drawing the legislature is acting as a surrogate for the people, * * *" (Appellees' brief, page 18). In furtherance of this reasoning Appellees further conclude "* * * That duty is a largely mechanical one, * * *. Such changes do not present political questions * * *." (Appellees' brief, page 20).

The alarm expressed by Judge Matthes in his dissenting opinion is certainly borne out by the foregoing argument of Appellees. The dissenting Judge concluded from the majority opinion "* * * that only the courts can ultimately assume and properly complete the task of Congressional redistricting * * *." (Preisler v. Secretary of State of

Missouri, 279 F.Supp. 952, l.c. 1005, P. 83, Appendices to Juris. Stat.).

Appellants are baffled and alarmed at this display of contempt and animosity toward legislative functions and political processes. Are Appellees in reality advocating a return to the system of rule by judges adhered to for a time by the Israelites in their history? Although this system may have provided effective government for the Israelites during a period of their history several thousand years ago, the concept is certainly alien to the Democratic traditions of this country.

Appellants view the legislative process and the political process with the same reverence and respect in which they hold the judicial process. Aristotle commented that man is a political animal. Appellants recognize this Aristotelian verity and are cognizant of their nature as man. However, Appellants do not claim any unique wisdom in conceiving congressional redistricting as a legislative function in the political process. This concept is supported by eminent authorities from many of the several states, to which we have extensively referred, in our principal brief (Pages 38-44). On the other hand, Appellees have failed to support with a single judicial authority their concept of this task of congressional redistricting as a mechanical or judicial function which the legislature happens to be performing.

Appellants vigorously oppose Appellees' contention that the function of congressional redistricting is the simple mechanical application of arbitrary lines to raw population statistics. There are an infinite variety of lines which can be applied to raw population statistics and the process can be continued into infinity without reaching mechanical perfection of raw population numbers in the districts. Appellants perceive the function as being a legislative deliberation in the political process through which expression is giv-

en to the multitude of legitimate competing interests of the community. The process is subjective and rational as opposed to objective and arbitrary. The end result will always be a compromise and the reasonableness of the compromise is tested by the equality in voting rights inherent therein.

III.

Appellees erroneously conclude that more substantial voter equality would result by the transfer of counties between adjacent districts (pages 13 through 16, Appellees' brief).

Appellees argue that greater equality of populations among the districts could have been achieved by the legislature in transferring whole counties between adjacent districts. Once again it must be emphasized that Appellees have totally misconceived the goal in apportionment cases. The goal is voter equality, not population equality, and Appellants firmly believe that raw census statistics are not the end-all in measuring voter equality.

Even under their own ground rules, Appellees have failed to propose a single comprehensive congressional redistricting plan resulting in closer population equality among the districts than in the 1967 Missouri Congressional Redistricting Act. Appellees' table and map on pages 14 and 15 of their brief is an unfinished game of congressional redistricting checkers. Various proposals are suggested which indicate a closer approximation in population of the two districts with which Appellees would tamper. Appellees imply that since two adjacent districts can be improved, a complete new improved plan is readily accessible. However, no single such plan is proposed.

The three St. Louis districts (1st, 2nd, & 3rd), are illustrative of this half-way approach taken by Appellees.

These three districts have a total "excess" population of 16,350, but Appellees give only cursory attention to the problem of distributing this population elsewhere. Appellee's partial solution is to remove Schuyler County (population 5,052) from the 9th to the 6th district, and then add the bulk of this "excess" population to the 9th district. They ignore the remainder of the "excess". (Page 16, Appellee's brief). This treatment, of course, flies in the face of what Appellant's believe to be blinding reality, which is that the 9th district has grown disproportionately in population since the 1960 census and was correctly "underpopulated" by the legislature (See table, supra pages 4-5).

> "• • • Implicit in this principle is the further proposition that the body creating an apportionment plan in compliance with a judicial order should ordinarily be left free to devise proposals for apportionment on an overall basis. • • •" **Burns v. Richardson**, 384 U.S. 73, 83, 16 L.Ed.2d 376, 386, 86 S.Ct. 1286 (1966).

The fact remains that neither Appellees nor the lower court have devised a comprehensive congressional redistricting scheme which would result in ten congressional districts which are more equal in raw population than the districts created by the 1967 act. This is fully discussed by Appellants in their brief (pages 62-65 Appellants' Brief on the Merits), and Appellees have not attempted to answer these discussions.

Appellants reiterate that raw census statistics standing alone are not a valid measure to determine voter equality. It must be remembered that the population of the largest district of the 1967 Missouri law exceeds the population of an average ideal district by 3.13%, and the population of the smallest district is 2.83% less than an average district. In viewing the reasonableness of these percentage variations

in congressional districts based upon raw census data, cognizance must be taken of errors in the census data. This inherent error is recognized by the census bureau as follows, **U. S. Bureau of the Census. U. S. Census of Population: 1960, Vol. I, Characteristics of the Population. Part A. Number of Inhabitants. U. S. Government Printing Office, Washington, D. C., 1961. Introduction page x:**

> "• • • On the basis of an independent demographic analysis, however, it seems likely that the true net underenumeration was closer to 3 percent and that the enumeration of the Post-Enumeration Survey had some of the same kinds of limitations as those of the decennial census, although in a lesser degree."

This inherent error in the census statistics is alluded to by the court in determining the validity of a congressional redistricting act in **Exon v. Tiemann**, 279 F.Supp. 609, l.c. 612 (1968). This 3% error in the census data is universally recognized as insignificant. Is it not equally true that population variations in congressional districts of 3% based upon this census data are equally insignificant?

Appellees' simplistic approach of bettering adjacent districts by the transfer of a county, basing such transfers on raw census data, also totally ignores the reality of shifting populations which took place from 1960 to 1967. Appellants have brought these realities to the attention of the court in their brief (pages 82-84, Appellant's Brief on the Merits). In determining the reasonableness of legislative action in 1967 the court must be cognizant of the imperfections in the population data which was available to the legislature.

IV.

Appellees have erroneously applied burden of proof standards to this case. (Pages 7-11, Appellee's Brief).

Appellees have raised a technical argument in their brief, the substance which is that the findings of the lower court cannot be set aside unless clearly erroneous. Various cases are cited in support of this principle. One of these cases, **United States v. United States Gypsum Co.**, 333 U.S. 364, 92 L.Ed. 746, 68 S.Ct. 525 (1948) is an instance where this court unanimously overturned findings of fact made by a United States District Court.

> "* * * That rule [Rule 52 (a), Federal Rules of Civil Procedure] prescribes that findings of fact in actions tried without a jury 'shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where 'clearly erroneous.' * * *" **(United States v. United States Gypsum Co.**, supra, 333 U.S. at 394, 395, 92 L.Ed. 765, 766.)

Appellants noted in detail in their Brief on the Merits what were considered to be significant "clearly erroneous" findings of fact (Pages 61-84). Appellees have not supported these disputed findings. For example, Appellants attacked the finding of the lower court "* * * that the 1967 Missouri Legislature in fact rejected plans that * * * would have produced a congressional districting plan that would have been in closer compliance with the constitutional command of Art. I, § 2." (**Preisler v. Secretary of State of Missouri**, 279 F.Supp. 952, 965; Pages 13-14, Appendices to Juris. State.). Appellants demonstrated the fallacy of this finding (Pages

62-63, Appellants' Brief) and Appellees made no response thereto. When an appealing party challenges certain findings of fact, and the responding party makes no effort to sustain such findings, it is difficult to see how the reviewing court has much choice but to deem the findings "clearly erroneous."

This standard of review varies in its application in accordance with the subject matter of the case under review. Appellees also cite in support of the standard they desire applied to this case, **Commissioner v. Duberstein**, 363 U.S. 278, 4 L.Ed.2d 1218, 80 S.Ct. 1190 (1960). This case is authority for the principle that a reviewing court shall give great deference to the expertise of a lower tribunal. In the cited case separate judgments of the United States Tax Court and a United States District Court were under review. The Tax Court, of course, is universally recognized for its expertise in its field. This recognition of expertise is not accorded courts of general jurisdiction such as the United States district courts. It is interesting to note in **Commissioner v. Duberstein** that this court recognized the expertise of the Tax Court by affirming the judgment of the Tax Court and refused to recognize any expertise in the district court by reversing the judgment of that court.

Certainly it cannot be validly argued that the United States district courts are tribunals of expertise in the area of legislative apportionment to which this court should accord great deference. Legislative apportionment cases are truly sui generis and the expertise in this area of the law resides in this court. A study of the legislative apportionment cases reaching this court reflects that this court treats such cases de novo. This is as it should be on the judicial frontiers of representative apportionment and is reflected by the following table:

LEGISLATIVE APPORTIONMENT CASES APPEALED TO UNITED STATES SUPREME COURT.

Affirmed

Alton v. Tawes, 384 U.S. 315, 16 L.Ed.2d 586, 86 S.Ct. 1590, (1966).

Branigin v. Duddleston, Nos. 1252, 1263, ___ U.S. ___, 20 L.Ed.2d 641, 88 S.Ct. 1666, (1968).

Connor v. Johnson, 386 U.S. 483, 18 L.Ed.2d 224, (1967), 87 S.Ct. 1174.

Davis v. Mann, 377 U.S. 678, 12 L.Ed.2d 609, 84 S.Ct. 1453, (1964).

Dinis v. Volpe, 389 U.S. 570, 88 S.Ct. 692, (1968), 19 L.Ed.2d 785.

Drum v. Seawell, (1966), 383 U.S. 831, 16 L.Ed.2d 298, 86 S.Ct. 1237.

Dusch v. Davis, 387 U.S. 112, (1967), 87 S.Ct. 1554, 18 L.Ed.2d 656.

Hill v. Davis, 378 U.S. 565, 12 L.Ed.2d 1037, 84 S.Ct. 1918, (1964).

Kirk v. Gong, 389 U.S. 574, (1968), 19 L.Ed.2d 784, 88 S.Ct. 695.

Kirkpatrick v. Preisler, 385 U.S. 450, 17 L.Ed.2d 511, 87 S.Ct. 613, (1967).

Martin v. Bush, 376 U.S. 222, (1964), 11 L.Ed.2d 656, 84 S.Ct. 709.

Nolan v. Rhodes, 383 U.S. 104, 15 L.Ed.2d 616, 86 S.Ct. 716, (1966).

Reversed

Avery v. Midland County, (1968), 390 U.S. 474, 20 L.Ed.2d 45, 88 S.Ct. 1114.

Burns v. Richardson, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376, (1966).

Duddleston v. Grills, 385 U.S. 455, 17 L.Ed.2d 508, 87 S.Ct. 611, (1967).

Germano v. Kerner, 378 U.S. 560, 12 L.Ed.2d 1034, 84 S.Ct. 1908, (1964).

Hearne v. Smylie, 378 U.S. 563, 12 L.Ed.2d 1036, 84 S.Ct. 1917, (1964).

Kilgarlin v. Hill, 386 U.S. 120, 87 S.Ct. 820, 17 L.Ed.2d 771, (1967).

Lucas v. Colorado General Assembly, 377 U.S. 713, 12 L.Ed.2d 632, 84 S.Ct. 1472, (1964).

Lucas v. Rhodes, 389 U.S. 212, 19 L.Ed.2d 423, 88 S.Ct. 416, (1967).

Maryland Committee for Fair Rep. v. Tawes, 377 U.S. 656, (1964), 12 L.Ed.2d 595, 84 S.Ct. 1442.

Nolan v. Rhodes, 378 U.S. 556, 12 L.Ed.2d 1034, 84 S.Ct. 1906, (1964).

Swann v. Adams, 378 U.S. 553, 12 L.Ed.2d 1033, 84 S.Ct. 1904, (1964).

Swann v. Adams, 385 U.S. 440, 17 L.Ed.2d 501, 87 S.Ct. 569, (1967).

Affirmed

Parsons v. Buckley, 379 U.S. 359, 13 L.Ed.2d 352, 85 S.Ct. 503, (1965).

Pinney v. Butterworth, 378 U.S. 564, 12 L.Ed.2d 1037, 84 S.Ct. 1918, (1964).

Reynolds v. Sims, 377 U.S. 533, 12 L.Ed.2d 506, (1964), 84 S.Ct. 1362.

Rockefeller v. Wells, 389 U.S. 421, 19 L.Ed.2d 651, 88 S.Ct. 578, (1967).

Roman v. Sincock, 377 U.S. 695, 12 L.Ed.2d 620, 84 S.Ct. 1462, (1964).

WMCA v. Lomenzo, 382 U.S. 4, 15 L.Ed.2d 2, 86 S.Ct. 24, (1965).

Williams v. Moss, 378 U.S. 558, 12 L.Ed.2d 1026, 84 S.Ct. 1907, (1964).

Wright v. Rockefeller, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512, (1964).

Reversed

WMCA v. Lomenzo, 377 U.S. 633, 12 L.Ed.2d 568, 84 S.Ct. 1418, (1964).

Wesberry v. Sanders, (1964), 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481.

CONCLUSION.

Appellees advance other arguments which in substance amount to a simple denial or comprehensive arguments developed in Appellants' brief. Appellants see no useful purpose in replying to what amounts to a general denial. Thus, no reply is made to Argument 1, page 5, Argument 3, page 11, Argument 6, page 24, and Argument 7, page 24 of Appellees' brief. Affirmative arguments on these points are fully developed in Appellants' Brief on the Merits.

Appellants again urge this court to reverse the judgment of the lower court and remand the cases with instructions that the 1967 Missouri Congressional Redistricting Act be declared constitutional. The relatively small variation in population of the districts therein, the questionable value of 1960 census data to 1967 redistricting and judicial recognition and appreciation of the legislative process warrant such action.

Respectfully submitted,

NORMAN H. ANDERSON
Attorney General
THOMAS J. DOWNEY
First Assistant Attorney General
LOUREN R. WOOD
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri
Attorneys for Appellants.